No. 83-372

IN THE

Supreme Court of the United States

October Term, 1983

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES POSTAL SERVICE,
Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT.

I.

THE POSTAL SERVICE IS ESTOPPED TO ARGUE THAT THE SUE AND BE SUED CLAUSE DOES NOT AUTHORIZE THE BOARD'S ADMINISTRATIVE LEVY.

The Postal Service devotes most of its brief (Appellee's Brief, pp. 8-25) to its argument that 39 U.S.C. § 401(1) did not waive the sovereign immunity of the Postal Service with regard to State tax garnishments. This is even though the Ninth Circuit opinion below found that the sovereign immunity of the Postal Service has been waived "clearly and unambiguously" by Section 401(1). (*Employment Development Dept. v. U.S. Postal Service* (9th Cir. 1981) 698 F.2d 1029, 1032.) The Ninth Circuit found that the tax garnishment of the Employment Development Department

(EDD) should have been honored (*Id.* at 1034), but that the tax garnishment of the Franchise Tax Board (the Board) was precluded by 5 U.S.C. § 5517. (*Id.* at 1035.) The Postal Service did not seek further review of the EDD portion of the decision and pursuant to the principles articulated by this Court in *Montana v. United States* (1979) 440 U.S. 147, the Postal Service should be estopped from relitigating the issue of sovereign immunity as it applies to a taxing agency's garnishment.

As this Court stated in *Montana v. United States, supra*, 440 U.S. 147, "[U]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." (*Id.* at 153.)

The Board originally filed this action to enforce an administrative levy (garnishment) which the United States Postal Service (Postal Service) refused to honor. (J.A. 8-44.) In a companion case, the EDD also filed an action to enforce an administrative levy which the Postal Service refused to honor. (A. 2.)

The Ninth Circuit held that the garnishment of the EDD should be honored, but that the garnishment of the Board was preempted by 5 U.S.C. § 5517. (*Employment Development Dept. v. U.S. Postal Service* (*supra*), 698 F.2d 1029, 1034-35.) The Ninth Circuit apparently concluded that both administrative levies were authorized by 39 U.S.C. § 401(1), the "sue and be sued" clause. (*Id.* at 1032.)

The Ninth Circuit stated, "[A]t issue is whether California state agencies may use California summary tax collection procedures to reach funds in the hands of the United States Postal Service." (*Id.* at 1031.)

The Ninth Circuit also stated:

"The Postal Service does not contend that it is immune from all suits, for § 401(1) of the Postal Reorganization Act clearly and unambiguously waives sovereign immunity by providing that the Service 'may sue and be sued.' See generally *FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490 (1940)." (Footnote omitted.) (*Id.* at 1032.)

Finally the Ninth Circuit relied on four of the Circuit Courts of Appeals decisions which had allowed the garnishment of Postal Service funds. These cases, *Kennedy Elec. Co., Inc. v. United States Postal Serv.* (10th Cir. 1974) 508 F.2d 954; *General Elec. Credit Corp. v. Smith* (4th Cir. 1977) 565 F.2d 291; *May Dept. Stores Co. v. Williamson* (8th Cir. 1977) 549 F.2d 1147 and *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, all held that the Postal Service is not immune from state garnishment or other related proceedings.

The present action is reminiscent of the continuing litigation in the various Courts of Appeals wherein the Postal Service continued to argue that 39 U.S.C. § 401(1) did not waive the sovereign immunity of the Postal Service and did not authorize a garnishment of its employees' wages or payments to its contractors. The Postal Service lost this issue in the 2nd, 3rd, 4th, 5th, 7th, 8th and 10th Circuits and never sought further review from this Court.[1] The Postal Service now admits that wage garnishments from ordinary judgment creditors should be honored, but again falls back on its sovereign immunity defense to argue that the Board's garnishment should not be honored because it is not based on a judgment.

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[1]This pattern of relitigating the question of sovereign immunity in each circuit and then never seeking review from this Court prompted two separate Court of Appeals Judges to criticize the Postal Service. See, *e.g.*, Judge Lay in *May Dept. Stores Co. v. Williamson* (*supra*), 549 F.2d 1147, 1149-1150; and Judge Weis in *Goodman's Furniture v. United States Postal Serv.* (1977) 561 F.2d 462, 465-466.

The Postal Service has already litigated this question and lost in the EDD portion of the case. It did not ask this Court to reverse that adverse judgment; thus it is now estopped to continue to make that argument.

In addition, by not seeking further review of the EDD portion of the case, the Postal Service has conceded that it would be required to honor EDD garnishments and that sovereign immunity has been waived to that extent. Also, under the authority of the Ninth Circuit opinion, the Postal Service will be required to honor future garnishments of EDD. If the Postal Service prevails in this case that it does not have to honor the Board's garnishment, would it not follow that where two taxing agencies are attempting to collect delinquent taxes, one agency's garnishment will be honored (EDD's) and one agency's garnishment will be denied (Franchise Tax Board's)?

II.

THE SOVEREIGN IMMUNITY OF THE POSTAL SERVICE HAS BEEN WAIVED AS TO GARNISHMENTS.

Introduction.

The Postal Service spends a great deal of time arguing that the Postal Service's immunity has not been totally waived. (Appellee's Brief, pp. 10-25.) It may be that Congress never gave the Postal Service any immunity (See *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, 388-389), or it may be that any immunity has been significantly waived, but the Court need not address those issues in order to find for the Board. For the Board to prevail, this Court only needs to find that the Board's garnishment has equal dignity to the garnishment of an ordinary judgment creditor.

The case law is clear and the Postal Service admits that § 401(1) authorizes a garnishment against the Postal Service. Thus, there is no dispute that the sovereign immunity has been waived at least to that extent. The only issue which this Court needs to address therefore, is whether the Board's garnishment is the type of garnishment which must be honored.

A. The Doctrine of Sovereign Immunity Is Not Favored and It Should Not Be Used to Interfere With a State's Attempt to Collect Its Taxes.

The Postal Service argues for a technical, restricted interpretation of § 401(1).[2] If this interpretation is accepted, the Franchise Tax Board may never collect tax revenue from certain Postal Service employees. The Board submits that the concept of sovereign immunity has become more disfavored over the last 45 years and that it should not be revitalized in this case to interfere with an activity as important as the collection of taxes.

This Court has held numerous times that the doctrine of sovereign immunity is not favored. *National Bank v. Republic of China* (1954) 348 U.S. 356, 359 ("But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."); *FHA v. Burr* (1939) 309 U.S. 242, 245 ("This policy [of liberally construing waiver of governmental immunity with regard to federal instrumentalities] is in line with the current disfavor of the doctrine of govern-

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[2]The Postal Service quotes selected portions of the *Burr*, *Menihan* and *Keifer* opinions. However, these cases are not helpful to the Postal Service. A review of these decisions indicates that this Court found in *all* cases that there was no sovereign immunity.

mental immunity from suit . . ."); *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, 392 (". . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . ."; see also, *R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, 84; *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, 203 ("We also note that the widespread dissatisfaction over the doctrine of sovereign immunity has continued unabated.").

In addition, various legal writers have expressed displeasure with the concept. See Cramton, "Nonstatutory Review Of Federal Administrative Action: The Need For Statutory Reform Of Sovereign Immunity, Subject Matter Jurisdiction, And Parties Defendant," 68 Mich. L. Rev. 387 (1970).

As Professor Cramton said, "[I]f problems related to sovereign immunity arose infrequently, it would be possible to regard the defects and wastefulness of the doctrine with a degree of equanimity. The litigating practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year." (*Id.* at 420.)

Professor Cramton also noted, "[N]o scholar so far as can be ascertained, has had a good word for sovereign immunity for many years." (*Id.* at 419; see also, Byse, "Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus," 75 Harv. L. Rev. 1479 (1962); Currie, "The Federal Courts and The American Law Institute," Part II, 36 U. Chi. L. Rev. 268, 290 (1969).[3]

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[3]In *Standard Oil Div., American Oil Co. v. Starks* (7th Cir. 1975) 528 F.2d 201, the Seventh Circuit collects numerous additional authorities who criticize the concept of sovereign immunity. (*Id.* at 203-204.)

B. The Sue and Be Sued Clause Should Be Broadly Construed.

The Franchise Tax Board has argued that sovereign immunity should be liberally construed (Appellant's Brief, p. 17) while the Postal Service has argued that it should be narrowly construed. (Appellee's Brief, p. 17.) The cases relied upon by the Postal Service deal with the sovereign immunity of the United States rather than with a federal agency. It is clear that a waiver of governmental immunity of a federal instrumentality should be *liberally construed.* (*R.F.C. v. Menihan Corp.* (1941) 312 U.S. 81, 84; *FHA v. Burr* (1940) 309 U.S. 242, 245; *Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381; *United States v. Shaw* (1939) 309 U.S. 495, 501 ("Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed."); see also Hart and Wechsler, *The Federal Courts and The Federal System* (2nd Ed., 1973) p. 1351.

The Postal Service is a "business-like enterprise," which is "quite unlike that of any other agency." Letter from U.S. Postal Service Law Department to the Honorable Gale W. McGee, Chairman, Committee on Post Office and Civil Service, U.S. Senate, reprinted in 1974 U.S. Code Cong. and Admin. News, 3450, 3453. Thus, the waiver of the immunity of this "business-like enterprise" should be liberally construed.

III.

THIS CASE DEALS SOLELY WITH WAGE GARNISHMENTS. IT HAS NO BEARING ON ADMINISTRATIVE AGENCIES IN GENERAL.

The Postal Service conjures a "parade of horribles" to support its position that the Board's garnishment should not be honored. The Service contends that if the Board is al-

lowed to garnish the wages of Postal Service employees then any official of any government unit across the nation "could order the Postal Service to pay over a sum of money" (Appellee's Brief, p. 6), and that if the Postal Service's waiver of immunity is not limited to judicial process it would include "any order issued by any official of any unit of government" (Appellee's Brief, p. 18).

This is objectionable for several reasons. The Board is not contending that the Postal Service is amenable to all administrative agencies and a decision in favor of the Board would not lead to that result. The Board is merely arguing that § 401(1) *authorizes* wage garnishments of Postal Service employees and that the Board has a wage garnishment which therefore should be honored. Other administrative agencies would not be affected by this decision unless they had obtained a *wage garnishment*.

When an ordinary judgment creditor garnishes the wages of a Postal Service employee, this requires the Postal Service to pay the money. By statute the Board has the same attributes as a judgment creditor with the same rights. The Postal Service only has the obligations to the Board that it would have as to any other judgment creditor. It is incorrect to argue that the Postal Service would then become subject to "any order issued by any official of any unit of government."

Over forty years ago this Court found that a "sue and be sued" clause waived the sovereign immunity of a federal instrumentality at least to the extent that it must honor a wage garnishment against its employee. (*FHA v. Burr* (1940) 309 U.S. 242.) Following the teaching of *Burr*, seven separate Circuit Courts of Appeals (discussed in Appellant's Brief at p. 17) have found that Section 401(1), the "sue and be sued" clause, authorizes garnishment of wages of Postal Service employees or payments to contractors. A decision in favor of the Board would follow this Court's

holding in *Burr* and as applied by the seven Circuit Courts of Appeals. Those cases have held that "sue and be sued" includes garnishment.

Numerous Courts have held that final tax assessments are given the force of a judgment (Appellant's Brief, p. 34), and that the Board's garnishment is "like post-judgment execution." (*Randall v. Franchise Tax Board of State of California* (9th Cir. 1971) 453 F.2d 381, 382.) The Board's garnishment is as valid as the garnishment of an ordinary judgment creditor. In fact, in order to facilitate the collection of taxes, the Board's garnishment should be more readily accepted.

A brief diagram will indicate the relationship of the Board to the taxpayer and the Postal Service and compare it to the relationship among an ordinary creditor, an ordinary debtor and the Postal Service.

1. *Franchise Tax Board*

   (FTB Assessment)

   a. FTB _____ or _____ Taxpayer

   (Taxpayer Self Assessed)

   b. Final assessment is equivalent to a judgment.

   c. FTB (GARNISHES) Postal Service

   d. FTB (SUES) Postal Service

   (If garnishment not honored)

2. *Ordinary Judgment Creditor*

   a. Creditor (SUES) Debtor

   b. Obtains Judgment

   c. Judgment Creditor (GARNISHES) Postal Service

   d. Judgment Creditor (SUES) Postal Service

   (If garnishment not honored)

This diagram is helpful for several reasons. First it shows how the Board goes through the equivalent steps of a judgment creditor and how "any official of any unit of government" would not follow the same procedures and thus could not require the Postal Service to pay over money, exhaust its administrative remedies, litigate to get its property back, etc. (Appellee's Brief, pp. 18-20.) Second, it shows that the garnishment step fits into both systems in the same manner and since the Postal Service now concedes that "sue and be sued" includes garnishment, there is no reason why the Board's garnishment should not be honored.

In fact, the other administrative agencies to which the Postal Service refers do not have garnishments and thus cannot rely on the authority of *Burr* or the seven Circuit opinions. Thus, it is clear that any Postal Service discussion of other administrative agencies is totally irrelevant to this case and should be disregarded.

IV.

THE BOARD'S WAGE GARNISHMENTS ARE NOT MORE BURDENSOME THAN CURRENT WITHHOLDING.

The Postal Service argues that garnishment procedures are more burdensome and disruptive than the withholding of current taxes. (Appellee's Brief, pp. 21, 31.) The Postal Service cites no authority for its assertion and in fact is incorrect. The Board contends that withholding (to which the Postal Service freely acquiesces) can create a conflict and that garnishment would not create an unreasonable burden. For example, the experience of the Franchise Tax Board has shown that increasing numbers of taxpayers are attempting to prevent the withholding of any amount of taxes from their paycheck. To accomplish this, they frequently exaggerate the number of exemptions they have or overestimate their deductions on their "W-4" form. Some even claim complete exemption from withholding.

This occurs on the national as well as state level and to deal with this problem, the Internal Revenue Service has instituted certain procedures. Where a taxpayer claims over 14 exemptions on his W-4, the employer must notify the Internal Revenue Service. (I.R.C. Reg. § 31.3402(f)(2)-1(g)(1).) The Internal Revenue Service may then notify the employer to disregard the W-4 filed by the taxpayer and to calculate the withholding based upon its determination. (I.R.C. § 31.3402(f)(2)-1(g)(5).) The Franchise Tax Board follows the same procedures and when the Internal Revenue Service disregards the W-4 of a California taxpayer, the Franchise Tax Board does likewise.

Thus, the taxpayer may institute a dispute involving the Franchise Tax Board, the Internal Revenue Service and the Postal Service as to the amount of tax which should be withheld. Nevertheless, Congress has specifically provided that federal agencies must comply with state and local withholding laws and procedures even though this is not a conflict-free situation for the Postal Service.

The Postal Service also argues that the Board's wage garnishment is more troublesome because it does not follow full litigation, the taxpayer may be surprised and the amount is more likely to be in dispute. (Appellee's Brief, p. 21.) Again, these assertions are erroneous.

As the Board discussed in detail in its brief (Appellant's Brief, pp. 31-32), a California taxpayer has ample notice of any tax deficiency assessed against him. He has the opportunity to meet with the Franchise Tax Board officials and to present any evidence which he feels supports his case. Thus, it is completely erroneous to contend that he will be surprised by the garnishment.

In addition, many tax liabilities are completely self-assessed. The taxpayer may admit he owes a certain amount

of money when he files a tax return but then does not remit the tax payment for whatever reason. It is clear that in this instance, the taxpayer will not be surprised and the amount could hardly be in dispute.

The Postal Service's argument also presumes, without any authority, that judgment debtors against whom someone has obtained a judgment will not be surprised and will not dispute the amount or validity of the judgment. This is simply not the case. These judgment debtors are just as likely to dispute their liability as are the Board's debtors,[4] yet the Postal Service admits it will honor the garnishment in the first case but not the second. Again, there is no logic in this position.

The Postal Service argues that if it honors the Board's garnishment the employee (taxpayer) may institute an action against the Postal Service. (Appellee's Brief, p. 21.) However, as the Board has discussed, the mere act of obtaining a judicial garnishment does not foreclose disputes over the underlying judgment. It follows that the ordinary judgment debtor and the tax debtor are equally likely or unlikely to institute an action against the Postal Service.

V.

CONGRESS IS CONCERNED WITH THE FISCAL OPERATIONS OF THE STATES.

Congress has recognized the importance of not interfering with a State's right to manage its fiscal affairs. By enacting 28 U.S.C. § 1341, Congress has provided that no district court shall enjoin the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be obtained in the State courts. In several recent

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[4]In some cases the Board's debtors may be less likely to dispute the liability, for example, where the tax liability has been self-assessed.

cases interpreting that statute, and in cases relying on the principle of comity, this Court has repeatedly protected the integrity of the States' taxing systems and held that the federal courts shall not interfere with a State's ability to collect its taxes. (See *California v. Grace Brethren Church* (1982) 457 U.S. 393, 411; *Fair Assessment In Real Estate v. McNary* (1981) 454 U.S. 100, 107; *Rosewell v. La Salle National Bank* (1981) 450 U.S. 503, 522; *Tully v. Griffin, Inc.* (1976) 429 U.S. 68, 73; *Great Lakes v. Huffman* (1943) 319 U.S. 293, 298.)

This Court has frequently articulated its concern for the States' ability to collect their taxes. See *California v. Grace Brethren Church* (*supra*), 457 U.S. 393, 410, n. 23. ("This Court has long recognized the dangers inherent in disrupting the administration of state tax systems."); *Fair Assessment In Real Estate v. McNary* (*supra*), 454 U.S. 100, 102 ("This Court, even before the enactment of § 1983, recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems."). Finally, both the *Fair Assessment* and *Grace Brethren* decisions cite the passage from *Dows v. City of Chicago* (1871) 11 Wall. 108, 110 which states:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public." *Fair Assessment, supra,* 454 U.S. 100, 102; *Grace Brethren, supra,* 457 U.S. 393, 410-411, n. 23.

The Board contends that the policy reasons given for not allowing a federal court to interfere with the collection of

a State tax have equal application to this case. In light of Congress' concern with the States' ability to collect their taxes, Congress could not have intended that Section 401(1) would waive the immunity of the Postal Service as to some garnishment procedures while denying the Franchise Tax Board the right to garnish the same wages.

VI.

THE POSTAL SERVICE IS MORE INDEPENDENT THAN MOST GOVERNMENT AGENCIES.

The Postal Service tries to align itself closely to the "government." However, when Congress created the Postal Service, it created an entity different from that previously known. 39 U.S.C. § 201 provides that it is "an independent establishment of the executive branch of the Government . . ." It is not an "executive department" as defined by 5 U.S.C. § 101; nor a "military department" (5 U.S.C. § 102); nor a government corporation (5 U.S.C. § 103). It is specifically excluded from the definition of "independent establishment" under 5 U.S.C. § 104, and thus it is presumably not an "executive agency" (5 U.S.C. § 105). One court tried to determine what "independent establishment" meant and finally concluded "that Congress intended the Postal Service to have greater independence than that of other independent establishments." (*Milner v. Bolger* (E.D. Calif. 1982) 546 F.Supp. 375, 378, n. 2.)

VII.

SECTION 5517 WAS ENACTED TO COOPERATE WITH THE STATES.

The Postal Service does not address the contention asserted by the Board in its brief that Congress could not have intended for the Board to forfeit its right to garnish the wages of Postal Service employees when it signed the § 5517 Agreement. (Appellant's Brief, p. 13.) Rather, the Postal

Service relies on 5 U.S.C. § 5520 which has no relevance to the Board's argument. (Appellee's Brief, pp. 27-31.)

The legislative history of 5 U.S.C. § 5517 indicates that Congress wanted to cooperate with the States in the collection of both current and delinquent taxes. When considering the legislation which became Section 5517, the Committee on Finance in the Senate stated, "[I]t is the policy of the Federal Government to cooperate with the States in the *administration of their tax laws* to the fullest extent practicable. To further this objective, your committee has approved Section 1999, authorizing Federal agencies to withhold State income taxes." (Emphasis added.) Sen. Rept. No. 1309 reprinted in 1952 U.S. Code Cong. and Admin. News, p. 2360. The Board submits that the "administration of their tax laws" includes both current withholding and garnishment and that Congress never intended Section 5517 to interfere with the Board's garnishment procedures.

VIII.

THE PIGGYBACK ENFORCEMENT PROVISIONS DEMONSTRATE A CONGRESSIONAL INTENT TO EXPAND STATE TAX COLLECTION REMEDIES.

The Postal Service argues that the "piggyback" enforcement provisions of the Internal Revenue Code, 26 U.S.C. § 6361, *et seq.*, demonstrate an overall Congressional policy with regard to the States' collection of delinquent tax liabilities. (Appellee's Brief, pp. 31-33.) It is difficult to view these provisions as an expression of limitation when Congress has made available, at the option of each state, all of the summary tax collection procedures utilized by the Internal Revenue Service. This can only be characterized as a Congressional expansion of state remedies considering that the Internal Revenue Service is authorized to collect delinquent state taxes by way of administrative levy on the wages of *all* federal employees. If the "piggyback" provisions of

the Internal Revenue Code demonstrate a pattern of Congressional action, such pattern is one of federal legislative consistency in recognizing and enhancing summary tax collection procedures for the benefit of every state.

Conclusion.

The doctrine of sovereign immunity has been soundly criticized by many scholars and courts and it should not be given new life in this case which deals with the collection of a tax from a Postal Service employee.

There is no longer any dispute that 39 U.S.C. § 401(1) includes garnishment. A reasonable construction supports the Board's contention that Section 401(1) also includes the Board's garnishment.

The Board has shown that a decision in its favor will not open the floodgates and allow *any* administrative agency to demand payment or action from the Postal Service. The Board has the attributes of a judgment creditor and is entitled to have its garnishment respected.

Congress enacted 5 U.S.C. § 5517 to cooperate with the States in collecting their tax. Congress could not have intended to make the Board choose between withholding current payments from a Postal Service employee and garnishing his wages to collect delinquent taxes.

Congress has tried to facilitate the collection of State taxes. There can be no public policy served by the Postal Service interfering with the collection of those taxes.

For these reasons, the Franchise Tax Board respectfully contends that the Decision of the Ninth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

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